IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. ——

WILLIAM G. MCRAE, PETITIONER

v.

JOHN A. BOYKIN, RESPONDENT

Petition for a Writ of Certiorari to the Court of Appeals of the State of Georgia and Brief in support thereof.

Now comes William G. McRae, and prays that a writ of certiorari issue to the Court of Appeals of the State of Georgia, to review here the record and judgment entered by that court on September 19, 1945 (R. 29), which judgment became a final judgment of the court of last resort of the State, denying federal rights of petitioner, when the Supreme Court of the State of Georgia refused to exercise its discretionary power to review said judgment by denying petitioner's application for writ of certiorari on January 16, 1945 (R. 45).

Opinion Below

The opinion of the Court of Appeals of the State of Georgia was entered on September 19, 1945 (R. 29) *McRae v. Boykin*, 35 *S. E. 2d* 548.

Jurisdiction

The jurisdiction of this Court is invoked under Section

237 (b) of the Judicial Code, as amended, (28 U. S. C. A. Section 344 (b)), the highest court of the State of Georgia having denied to petitioner a title right, privilege and immunity specially set up and claimed by him under the Constitution of the United States.

Federal Questions Raised by Plea to Scire Facias to Revive Dormant Judgment

Scire facias to revive a dormant judgment (R. 5) was issued upon petition (R. 3) brought by John A. Boykin against William G. McRae in Fulton County Superior Court. McRae filed his plea under oath (R. 6) specially setting up and claiming a denial by the State of Georgia through the agency of the Court of Appeals, upon appeal from said original judgment, of his rights to equal protection of the laws and due process of law under the provisions of the Fourteenth Amendment of the Federal Constitution. Boykin filed his general demurrer to the plea. (R. 27) The demurrer was sustained and the plea stricken (R. 28) and judgment was entered reviving the original judgment. (R. 28) On Bill of Exceptions to the Court of Appeals (R. 1) assigning error upon these rulings of the trial court, the Court of Appeals affirmed the judgment of the trial court. (R. 35) In denying the federal rights asserted by McRae in his plea the Court of Appeals said (R. 34):

> "It was held by the U. S. Supreme Court, in *Dunbar v. City of New York*, 251 U. S. p. 516, that 'Constitutional rights cannot be based on error in prior court decisions'."

Motion for Rehearing was filed (R. 35) and was denied by the Court of Appeals (R. 44). Application for writ of certiorari was made to the Supreme Court of Georgia, and the writ was denied January 16, 1946 (R. 45). All possibilities afforded by state procedure for a review of the judgment of the Court of Appeals by all state tribunals have been exhausted.

Questions Presented

1. Whether or not a party who is injured by the affirmance of a judgment against him on appeal, because of the application to his case on the appeal of an arbitrary and discriminatory rule, unsupported by law, which is different from and in conflict with the established rules of law applicable and applied in such cases to all other persons litigant in said Appellate Court, under the same or similar circumstances, may, in response to a scire facias brought to revive the judgment so affirmed, defend upon the ground that the State, by the decision of its Appellate Court on the former appeal, through the application of an arbitrary and discriminatory rule, deprived him of equal protection of the laws in violation of the provisions of the 14th Amendment of the Federal Constitution.

2. Whether or not a party against whom a writ of scire facias issues, requiring him to show cause why a judgment against him which had become dormant should not be revived, may, in response to the rule, set up and claim as a defense to such revival: that the judgment sought to be revived was appealed to an appellate court of the State upon error being assigned thereon, because of antecedent erroneous rulings of the court, and that in passing upon said appeal the appellate court, in affirming said judgment, has denied said party equal protection of the laws and deprived him of his property without due process of law in violation of his rights under the Fourteenth Amendment of the Federal Constitution.

3. Whether or not a denial of due process of law and a denial of equal protection of the laws by the appellate court in passing upon the assignments of error in a bill of exceptions challenging the legality of a judgment may be pleaded as a defense in a proceeding to revive said judgment.

Specification of Errors to be Urged

The Court of Appeals of Georgia erred—

1. In holding that its former judgments in the case of *McRae v. Boykin*, 50 *Ga. App.* 866, 54 *Ga. App.* 158, and the judgment of the Supreme Court of Georgia in *Boykin v. McRae*, 182 *Ga.* 252, is res adjudicata and conclusive between the parties as to whether the Court of Appeals by its former decisions and judgments denied to petitioner equal protection of the laws and deprived petitioner of his property without due process of law, in violation of the Fourteenth Amendment of the Federal Constitution.

2. In holding that a denial of due process of law and a denial of equal protection of the laws by the Court of Appeals in passing upon the assignments of error in a bill of exceptions challenging the legality of a judgment may not be pleaded as defenses in a proceeding to revive said judgment.

3. In denying to petitioner the right to plead defenses to a writ of scire facias to revive a dormant judgment which were not available to him on the original trial, and which petitioner was not precluded by judgment, or otherwise forbidden by law to set up, and which defenses are based upon a claim of substantial right, to-wit: a claim of denial of equal protection of the laws to petitioner by the State, and a claim that the State deprived petitioner of his property without due process of law in the former decisions by its Court of Appeals on appeal from said judgment, wherein it applied an arbitrary and discriminatory rule against petitioner, contrary to the established rules of law applicable and applied to all other persons litigant in said Court under the same or similar circumstances, in violation of the provisions of the Fourteenth Amendment of the Federal Constitution, and which defenses did not arise until after its judgments on the former appeal.

4. In denying to petitioner his right to claim by plea the benefit of the constitutional doctrine of stare decisis established by Article VI, Section II, Paragraph IX, of the Constitution of the State of Georgia, which provides:

> "The decisions of the Supreme Court shall bind the Court of Appeals as precedents,"

by upholding the application by it, on petitioner's former appeal, of an arbitrary and discriminatory rule, unsupported by law, and which was different from the established rules of law laid down by the Supreme Court of Georgia in the decisions specified in said plea, and which established rules of law have been applied by said Court of Appeals and the Supreme Court of Georgia to other persons litigant in said courts, under the same or similar circumstances, and in thus denying to petitioner in this case his legal and constitutional right to plead as a defense to the scire facias the fact that the State of Georgia, through the agency of said Court of Appeals, had, upon the former appeal in said case, denied to petitioner the equal protection of the laws and deprived petitioner of his property without due process of law, contrary to the provisions of the Fourteenth Amendment to the Federal Constitution.

5. In denying the asserted federal rights of petitioner through its application of its own former judgment on appeal, such application being clearly inconsistent with due process of law.

6. In holding that no issuable facts were raised in petitioner's plea in the present proceeding.

7. In affirming the judgment of the trial court.

Summary Statement of the Matter Involved

In 1933, William G. McRae brought suit against John A. Boykin in the City Court of Atlanta, Fulton County, Georgia, claiming damages for libel. McRae alleged that Boykin de-

famed him during a political race in which McRae was a candidate opposing Boykin's re-election to the office of Solicitor-General of the Atlanta Judicial Circuit, in the State of Georgia. Boykin had charged in the press and over the radio that McRae was a bribe-taker, which charge McRae alleged was falsely and maliciously made by Boykin with intent to injure and damage him. Boykin filed his answer to the petition, admitting that he had charged McRae with being a bribe-taker, but pleaded privilege. Boykin also filed a cross-bill in which he alleged that McRae had libeled him during the campaign by falsely and maliciously publishing of and concerning him that "Boykin's reputation as a frame-up artist was well known to the people of Fulton County," and that "Boykin had framed Jack Lance for the murder of Bert Donaldson." McRae filed a plea of privilege to the cross-bill. When the case was called for trial, Boykin withdrew his plea of privilege in the main case and filed a plea of justification.

Upon the trial of the case, Boykin was permitted, over McRae's objection, to read to the jury the depositions of certain witnesses which were offered in support of his belated plea of justification. McRae had made timely motion to suppress these depositions, which motion was overruled by the court. McRae offered to testify in support of his plea of privilege to the cross-bill and offered certain documentary evidence, in support of said plea, but upon objection by Boykin that said proffered testimony and said documents were irrelevant and immaterial to the issues in the case, they were excluded from the jury by the trial court.

The jury found a verdict for $1,000.00 in favor of Boykin upon his cross-bill and judgment was entered against McRae based upon said verdict.

McRae carried the case to the Court of Appeals of the State of Georgia, by direct bill of exceptions, assigning error upon

the rulings of the trial judge in failing to suppress the depositions and in permitting said depositions to be read to the jury in support of Boykin's plea of justification, and upon the rulings of the trial judge in excluding from the jury the proffered testimony and documentary evidence offered by McRae in support of his plea of privilege filed to Boykin's cross-bill, upon which the verdict in the case was based, and also assigning error upon the final judgment, because of the antecedent errors in the admission and exclusion of said evidence, which entered into and affected said final judgment. Error was also assigned upon the failure of the trial judge to write out and read to the jury a written charge upon timely request by McRae.

Boykin filed his motion in the Court of Appeals of Georgia, to dismiss the bill of exceptions upon the ground that error in failing to write out and read to the jury a written charge, and errors committed in rulings as to the admission or exclusion of evidence upon the trial, were not such errors as may be reviewed by the Court of Appeals of Georgia upon direct bill of exceptions, but could only be reviewed upon a bill of exceptions assigning error upon the denial of a motion for new trial. The Court of Appeals held such errors to be reviewable by it upon direct bill of exceptions, and proceeded to pass upon the questions presented to it. *McRae v. Boykin*, 50 *Ga. App.* 866.

In its said decision, the court held that all of the above specified rulings of the trial judge were erroneous as contended by McRae. It held that the failure of the trial judge to write out and read to the jury a written charge was reversible error, and reversed the judgment of the lower court upon this ground. It also held that the trial judge erred in failing to suppress the depositions and in permitting the evidence contained therein to be read to the jury in support of Boykins plea of justification in the main action, and that the trial judge erred in excluding from the jury the testimony and documents proffered by McRae

in support of his plea of privilege to Boykin's cross-bill. However, by its application of an arbitrary and discriminatory rule, unsupported by law, it held that the errors of the trial judge in permitting the jury to consider illegal evidence in support of Boykin's plea of justification, and in declining to let the jury consider legal evidence in support of McRae's plea of privilege to the cross-bill, were harmless errors, not requiring the grant of a new trial.

As will be hereinafter shown, it is the application of said arbitrary and discriminatory rule by the Court of Appeals, on the former appeal of the case, which is the basis of petitioner's claims, set up in his plea to the scire facias, that the State thereby deprived him of his property without due process of law and denied to him equal protection of the laws, contrary to the provisions of the Fourteenth Amendment of the Federal Constitution.

Both Boykin and McRae filed applications in the Supreme Court of Georgia for review on writ of certiorari of the rulings of the Court of Appeals in said decision that were adverse to them. McRae's application for writ of certiorari was denied. Boykin's application was granted. The Supreme Court of Georgia affirmed the judgment of the Court of Appeals in overruling and denying Boykin's motion to dismiss the direct bill of exceptions, but reversed the judgment of the Court of Appeals granting a new trial for failure of the trial judge to write out and read to the jury a written charge upon the ground that McRae had waived the right to except to such failure. *Boykin v. McRae*, 182 *Ga.* 252.

McRae then filed in the Court of Appeals a motion requesting the court to revise its opinion that the errors found by it with respect to the admission and exclusion of said evidence were harmless errors. The Court of Appeals entertained and con-

sidered the motion, but held that the rulings theretofore made should not be changed or modified, except in accordance with the decision of the Supreme Court on certiorari, and the motion to revise the opinion was denied and the judgment of the trial court was affirmed. McRae's application to the Supreme Court of Georgia for writ of certiorari to review this judgment was denied. *McRae v. Boykin* 54 *Ga. App.* 158.

The original judgment became dormant after the lapse of more than seven years during which time Boykin made no attempt to enforce it.

On October 14, 1944, upon petition of Boykin, a writ of scire facias was issued and served upon McRae requiring him to show cause why said judgment should not be revived. (R. 5)

McRae filed an issuable plea under oath setting up that the State of Georgia, through its Court of Appeals, in passing upon the assignments of error made by him in his bill of exceptions in McRae v. Boykin, supra, applied an arbitrary and discriminatory rule, unsupported by law, and thereby deprived him of his property without due process of law and denied him equal protection of the laws in violation of the provisions of Article XIV, Section 1 of the Constitution of the United States. (R. 6)

Boykin filed a general demurrer to said plea (R. 27). The trial court sustained Boykin's general demurrer, struck McRae's plea (R. 28) and entered an order reviving said judgment. (R. 28)

McRae carried said case to the Court of Appeals of Georgia by bill of exceptions assigning error upon said rulings of the trial court. (R. 1) The Court of Appeals affirmed the judgment of the trial court upon the ground that its former decisions in McRae v. Boykin, supra, and the decision of the Supreme Court

of Georgia in *Boykin v. McRae,* 182 *Ga.* 252, were res adjudicata of the constitutional questions raised, and upon the ground that constitutional rights can not be based on error in prior court decisions. Opinion of September 19, 1945. (R. 29)

McRae filed his motion for rehearing which was denied (R. 44).

McRae filed his application for writ of certiorari in the Supreme Court of Georgia which was denied (R. 45).

Petitioner incorporates in the appendix hereto copies of the former opinions in the case: *McRae v. Boykin,* 50 *Ga. App.* 866; *Boykin v. McRae,* 182 *Ga.* 252; *McRae v. Boykin,* 54 *Ga. App.* 158.

Reasons for Granting the Writ

The decision of the Court of Appeals of Georgia in this case has decided Federal questions of substance which have not heretofore been determined by this court, and has decided them in a way probably not in accord with applicable decisions of this Court. The decision of the Court of Appeals of Georgia should be reviewed by this Court because:

1. The decision of the Court of Appeals of Georgia disposing of the Federal questions raised by petitioner in his plea, by following its decision on a former appeal as the law of the case, deprives petitioner of his right to defend the action upon the ground that the State, through the decision of its said court on the former appeal, denied to petitioner equal protection of the laws and due process of law in violation of the Fourteenth Amendment of the Federal Constitution, and such decision cannot be regarded as resting on the independent non-federal ground of res adjudicata, under the rulings of this Court in *Southern Railway Co. v. Clift,* 260 *U. S.* 316.

2. The decision of the Court of Appeals of Georgia holding that the language in the decision of this Court in *Dunbar v. City of New York*, 251 *U. S.* 516, that "Constitutional rights cannot be based on error in prior court decisions," precludes petitioner from claiming that the State of Georgia, through the said Court of Appeals of Georgia, has denied petitioner equal protection of the laws and due process of law by its decision on a former appeal of this case, and is tantamount to depriving the citizens of the United States residing in Georgia of the right to demand equal protection of the laws and due process of law at the hands of the judicial branch of the State government, and is in conflict with the decision of this Court in *Virginia v. Rivers*, 100 *U. S.* 313, 322, where this court held that "Denials of equal rights in the action of the judicial tribunals of the State are left to the revisory powers of this court."

3. This Court should review and reverse the decision and judgment of the Court of Appeals of Georgia in this case, because it affirmed a ruling of the trial court denying petitioner the right to plead in answer to a writ of scire facias to revive a judgment—a denial by said Court of Appeals to petitioner of equal protection of the laws and due process of law on a former appeal from said judgment, as a result of which said denials, said judgment was illegally affirmed. This case proceeded to judgment upon the pleadings. It is elementary, therefore, that every uncontradicted allegation of fact made in petitioner's plea must be taken as true.

4. This is the first occasion that there has been presented to this Court the question whether a denial of equal protection of the laws by an appellate judicial tribunal of a State while affirming a judgment on appeal, may be pleaded by the injured party as a defense to a writ of scire facias brought to revive the judgment so affirmed.

I

THE COURT OF APPEALS OF GEORGIA IS WITHOUT JURISDICTION TO RENDER A JUDGMENT WHEREIN IT DECIDES A QUESTION OF LAW CONTRARY TO A PREVAILING DECISION OF THE SUPREME COURT OF GEORGIA.

This court said in *State of Missouri, ex rel. Gaines v. Canada, et al*, 305 *U. S.* 337 (7):

> "The 'equal protection of laws' is a pledge of the protection of equal laws."

In *Hill v. State of Texas*, 316 *U. S.* 400, this court declared:

> "Equal protection of the laws is something more than an abstract right. It is a command which the State must respect, the benefits of which every person may demand."

The people of Georgia, in their Constitution, Article VI, Section II, Paragraph IX, have ordained:

> "The decisions of the Supreme Court shall bind the Court of Appeals as precedents."

This constitutional doctrine of stare decisis, insofar as the jurisdiction of the Court of Appeals is concerned, is a command to the Court of Appeals that when a point of law has been settled by decision of the Supreme Court of Georgia, it forms a precedent which is not afterwards to be departed from by the Court of Appeals of Georgia, unless it is changed by the Supreme Court in the manner provided by law.

The rule of stare decisis is stated in Broom Leg. Mx. 7th edition 147, as follows:

> "To abide by former precedents, *stare decisis*, where the same points come again in litigation, as well to keep

> the scale of justice even and steady, and not liable to waiver with every new judge's opinion, as also because, the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or swerve from according to his private sentiments; he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land,—not delegated to pronounce a new law, but to maintain and expound the old one—jus dicere et non jus dare."

It is the law of Georgia that—

> "Errors are presumed to be harmful to the losing party, unless the contrary plainly appears."

The foregoing statement was made by the Supreme Court of Georgia in a decision by a full bench in the case of *Battle v. Royster Guano Co.* 155 *Ga.* 322 (3). The principle there followed was laid down in different language by the same court in the early case of *Tedder v. Stiles*, 16 *Ga.* 1, 2 (6), as follows:

> "Whenever the rights of a party are withheld or violated, the presumption of law is, that he has been harmed."

The same rule, as applied to the exclusion of evidence, was announced by the decision of this Court in *Crawford v. United States*, 212 *U. S.* 183, in the following language:

> "If the erroneous exclusion of evidence injuriously affects a substantial right it is reversible error. It is only in cases where the *absence of harm* is *clearly shown by the record* that the commission of such error against the party complaining is not cause for new trial."

The Court of Appeals of Georgia always applied the foregoing rule of law in similar cases prior to its decisions in the

cases of *McRae v. Boykin*, 50 *Ga. App.* 866, 54 *Ga. App.* 158, and has consistently applied the same rule since that time in similar cases. Only in McRae v. Boykin, supra, did the Court of Appeals adopt an arbitrary and discriminatory rule different from the foregoing rule of law.

In McRae v. Boykin, supra, the Court of Appeals arbitrarily ruled that although the record showed numerous material errors which deprived petitioner of substantial rights, and nothing in the record showed absence of harm in any of said errors, they should be considered harmless errors upon speculation by the Court as to matters which possibly might have appeared in the record if the trial judge had not certified otherwise. The Court of Appeals in thus speculating as to the possibility that there might have been "other evidence," and its further speculation as to whether said "speculative" other evidence was "but slight evidence, or doubtful evidence, or evidence that was not clear and convincing," or whether such "speculative" other evidence was "clear and convincing," is a direct impeachment of the certificate of the trial judge to the bill of exceptions: "That the foregoing bill of exceptions is true, and contains *all* of the evidence and specifies *all* of the record material to a clear understanding of the errors complained of." (Italics mine)

In the erroneous exclusion of evidence, "it is only in cases where the *absence of harm* is *clearly shown by the record* that the commission of such error against the complaining party is not cause for new trial." *Crawford v. United States*, 212. *U. S.* 183.

In *Rice v. Ware*, 3 *Ga. App.* 573, 578, the Court of Appeals in one of its earliest decisions, said that the reviewing court must conclusively presume that evidence omitted by the trial judge was not such that it could in any wise affect the decision of the question presented in the record. On page 578 of the opinion the court said:

"By the act of 1889 (Civil Code, 5528), the provisions of which are mandatory and not merely directory, 'If the case is not one in which a motion for new trial is to be reviewed, the plaintiff in error shall plainly and specifically set forth the errors alleged to have been committed, shall incorporate in the bill of exceptions a brief of so much of the written and oral evidence as is material to a clear understanding of the errors complained of, and shall specify therein such portions of the record as are material to such understanding. If none of the evidence is material to elucidate the errors complained of, this fact shall be stated and the evidence omitted. The judge to whom such bill of exceptions is tendered shall, if needful, change the same so as to conform to the truth and make it contain all the evidence, and refer to all of the record, necessary to a clear understanding of the errors complained of;' and the certificate to the bill of exceptions recites that it contains all of the evidence material to a clear understanding of the errors complained of. *In such case the trial judge, and not the reviewing court,* is given the *power to decide* whether any portion of the evidence is *immaterial,* and therefore to be *omitted.* We therefore *conclusively presume* that the *omitted* evidence was *not* such that it could in *any wise affect* the *decision* of the *question presented* in the record." (Italics mine)

The affirmance of the judgment against petitioner by the Court of Appeals on the former appeal in this case was a clear denial of equal protection of the law and due process of law to petitioner.

In divisions 2 and 3 of its decision on the former appeal, *McRae v. Boykin,* 50 *Ga. App.* 866, the Court of Appeals adjudicated the admission of certain depositions in evidence in support of Boykin's plea of justification to be error, then proceeded to hold the admission of said depositions in evidence to be harmless error, citing as authority the cases of *Matthews v. Richards,* 19 *Ga. App.* 489 (2) (91 *S. E.* 914); *Smith v. State,* 23 *Ga. App.*

76 (97 *S. E.* 454); *L. & N. R. Co. v. Lovelace*, 26 *Ga. App.* 286 (106 *S. E.* 6); *and General Tire and Rubber Co. v. Brown Tire Co.*, 46 *Ga. App.* 548 (168 *S. E.* 75).

The cited decisions are not authority for the proposition that the Court of Appeals may impeach the certificate of the trial judge that "the bill of exceptions contains all of the evidence material to a clear understanding of the errors complained of" by speculating that "other evidence" material to a clear understanding of the errors complained of might have been omitted from the bill of exceptions by the trial judge.

On the contrary, each of said cited cases support the contention of petitioner that error will be considered harmless *only where the absence of harm is clearly shown by the record.* In each of the cases cited it appeared affirmatively from the evidence contained in the bill of exceptions or from the certificate of the trial judge thereto that a great amount of other evidence to the same effect as the evidence which was ~~excluded~~ admitted over objection was admitted upon the trial without objection. Nothing of that kind appeared in this case, and said citations were not in the least applicable to the facts in this case on said former appeal.

In division 5 of its decision on the former appeal, not a single authority is cited by the Court of Appeals in support of its conclusion, that the error committed by the trial judge in excluding all of the oral testimony and documentary evidence offered by petitioner in support of his valid plea of privilege, was harmless, upon the theory that there might have been "other evidence" offered in support of said plea. There exists no authority for such an arbitrary and discriminatory ruling, and it is contrary to the established principles of law in Georgia as set out in petitioner's plea to the writ of scire facias.

In its opinion in the *instant* case the Court of Appeals, in listing cases of the Supreme Court of Georgia with which petitioner

charged its arbitrary ruling in McRae v. Boykin, supra, to be in conflict, named all of the five cases enumerated in petitioner's plea, except the case of *Battle v. Royster Guano Co.*, supra.

The significant omission of any reference to *Battle v. Royster Guano Co.*, supra, is no doubt due to the embarrassment it suffers as a result of petitioner having called to the court's attention that it had cited *Battle v. Royster Guano Co.*, supra, in support of its ruling in a similar case which it decided long after its decisions in *McRae v. Boykin*, supra. In the case of *Stanley v. Warner Brothers Pictures*, 64 *Ga. App.* 228, 231, 232, it applied the rule in *Battle v. Royster Guano Co.*, supra.

Dealing with the contention that an error in striking an amendment was harmless, Broyles, C. J., on motion for rehearing in the Stanley case, said:

> "In their motion for a rehearing of this case the movants contend that the error, if error, in striking the amendment to the petition was harmless, since on the trial the plaintiff was permitted to offer and to have admitted all the evidence that could have been admitted if the amendment had been allowed. The record does not affirmatively support this contention. It does appear therefrom that some evidence in support of some of the allegations of the stricken amendment was admitted, but it fails to appear that such evidence was not admitted for limited purposes only. And it does not appear that *all* of the evidence that would have been admissible, if the amendment had been allowed, was admitted on the trial. The cases cited by movant, which hold that where *all* evidence, which could have been admitted in support of a stricken amendment, was thereafter admitted, the error in striking the amendment was harmless, are differentiated from this case. Since an error by the court 'is presumed to be harmful to the losing party, unless the contrary plainly appears,' the error 'must be held to have been prejudicial,' and a new trial should be granted. *Battle v. Royster Guano Co.*, 155

> *Ga.* 322 (3) (118 *S. E.* 343). In the instant case this court cannot hold that it 'plainly appears' that the plaintiff was permitted to introduce *all* the evidence that he could have introduced had the amendment in question been allowed."

Having held that it is reversible error to strike a material amendment unless it clearly appears affirmatively from the record that *all* of the evidence that would have been admissible, if the amendment had been allowed, was admitted on the trial; we asked the Court of Appeals why the exclusion of *all* of petitioner's material evidence, and even the proffered oral testimony of petitioner as to his possession of said evidence, both of which were offered by petitioner in support of his pending valid plea to the cross-action in the case, could be considered harmless error by said court, in the absence of anything in the record to show that even a scintilla of evidence was admitted in support of said plea?

Unwilling to make a straight-forward answer to that question, the Court of Appeals attempts to avoid its discriminatory decision, denying equal protection of the laws to petitioner, by resort to a misapplication of the doctrines of "res adjudica" and "law of the case."

II

Decisions On Former Appeal Of Case Not Res Adjudicata Of Question Whether By Said Decisions Themselves Petitioner Was Denied Due Process Of Law And Equal Protection Of The Laws

In the second division of its opinion the Court of Appeals holds that its opinion and judgment on the former appeal of this case is forever binding upon the parties and their privies,

even though by its said opinion and judgment it did deprive petitioner of his property without due process of law and denied petitioner equal protection of the laws.

Judgments are conclusive between parties and their privies only as to "matters put in issue, or which under the rules of law might have been put in issue in the cause wherein the judgment was rendered." *Code of Georgia*, 1933, *Section* 110-501.

The matter of whether the Court of Appeals did, by its former opinion and judgment, deny petitioner equal protection of the laws, could not be known until after said judgment was rendered, and could not have been put in issue before said judgment was rendered.

This Court, in *Virginia v. Rivers*, 100 *U. S.* 313, 318-319, defines the time when the issue as to a denial of equal protection of the laws by judicial tribunals arises, as follows:

> "The violation of the constitutional provisions, when made by the judicial tribunals of a State, may be, and generally will be after the trial has commenced. It is then, during or after the trial, that denials of a defendants rights by judicial tribunals occur. Not often until then. Nor can the defendant know until then that the equal protection of the laws will not be extended to him. Certainly until then he cannot affirm that it is denied or that he cannot enforce it, in the judicial tribunals."

The doctrine of res adjudicata, sought to be invoked in the second division of the Court of Appeals decision in this case, clearly does not reach the issue as to whether by its former judgment it denied petitioner the equal protection of the laws. This issue did not arise until after the former judgment affirmed that equal protection was denied. Until that judgment petitioner could not affirm that equal protection of the laws was denied, and could not affirm that he could not enforce his right to equal protection of the laws in that court.

The Court of Appeals decision in this case does not rest, therefore, upon the independent non-federal ground of res adjudicata.

In *Southern R. Co. v. Clift*, 260 *U. S.* 316, 317, this court said:

> "A decision of a state court disposing of a federal question by following its decision on a former appeal as the law of the case, cannot be regarded as resting on the independent, non-federal ground of *res adjudicata*."

See also, *Postal Telegraph Cable Co. v. Newport*, 247 *U. S.* 464.

In discussing the protection afforded citizens by the Fourteenth Amendment of the Constitution at page 318 of the opinion in *Virginia v. Rivers*, supra, this court said:

> "It is doubtless true that a state may act through different agencies,—either by its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all action of the state denying equal protection of the laws, whether it be action by one of the agencies or another."

And on page 322 of the opinion in the same case, this court said:

> "Denials of equal rights in the action of the judicial tribunals of the State are left to the revisory powers of this court."

In *First National Bank v. Anderson*, 269 *U. S.* 347, 346, this Court said:

> "Whether a pleading sets up a sufficient right of action of defense, grounded on the Constitution, or a law of the United States, is necessarily a question of Federal law; and where a case coming from a State court presents that question, this Court must determine for itself the sufficiency of the allegations displaying the right or defense,

> and is not concluded by the view taken of them by the State Court."

The multitudinous errors found by the Court of Appeals to have been committed on the original trial are, by law, presumed to be harmful to petitioner. This presumption is rebutted only where absence of harm is clearly and plainly shown by the record before the Court of Appeals. Absence of harm did not so appear from that record, and the Court of Appeals so stated, in its decision on the former appeal. In depriving petitioner of the presumption of harm which the law attaches to errors committed against him, while sustaining this presumption in favor of other persons litigant in said court under the same or similar circumstances, the Court of Appeals denied petitioner the equal protection of the laws.

Petitioner has sought to have the courts of Georgia to rectify the gross injustice done him, but without success. He now asks this court to invoke its revisory powers and to reverse the decision of the Court of Appeals which has denied petitioner's claim to equal protection of the laws, as set up in his plea in the lower court.

As was said by this Court in *Louisville Gas Co. v. Coleman*, 277 *U. S.* 32:

> "The equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances. It applies to the exercise of all the powers of the State which can affect the individual or his property."

The Petition for Certiorari should be granted in order that this Court may review the decision of the Court of Appeals of Georgia in this case.

Respectfully submitted,
WILLIAM G. MCRAE, PRO SE,
Petitioner.

APPENDIX

23926 McRae v. Boykin, 50 Ga. Appeals, 866

1. An error of law may be reviewed and corrected by this court upon direct bill of exceptions which assigns error upon the final judgment, where the commission of the alleged error by the trial court deprived the plaintiff in error of a substantial right; and where it is shown that the error complained of was harmful and prejudicial and necessarily affected the verdict.

2. Where the questions propounded to a witness under deposition, taken under sections 5904 et seq. of the Civil Code (1910), by the plaintiff on cross-examination, have not been answered by the witness, and the notice of exceptions as provided in section 5904 of the code has been given to the defendant, and there is no motion by him to continue the trial of the case, and it proceeds to trial, the refusal of the court to sustain the exceptions of the plaintiff to the motion to suppress the depositions of the witness is erroneous, and may in a proper case require the grant of a new trial.

3. In order for this court to grant a new trial because of alleged error in the introduction of evidence, upon direct exception to this court, it is incumbent upon the plaintiff in error to affirmatively show in the bill of exceptions that he was harmed and prejudiced by such ruling, and where there is no brief of the evidence before this court, and it is not made to appear from the bill of exceptions but that there was other evidence before the jury upon the same subject, the plaintiff in error fails to show error requiring the grant of a new trial in the erroneous introduction of such evidence.

4. Where the defendant assumed, without objection, the burden of proof, it was not error to allow him to open and conclude the argument before the jury. With this principle in view, in order to successfully assign error, in a direct bill of exceptions, upon the action of the trial court in refusing to allow

the plaintiff in error, plaintiff in the court below, the right to open and conclude the argument before the jury, it was necessary for him to affirmatively show that he had the right to open and conclude, and that he had not waived it by acquiescing in the assumption by the defendant of the affirmative of the proof.

5. While the trial court erred in refusing to admit the plaintiff's proffered testimony set out in the bill of exceptions, and certain newspaper articles and court records in support of such testimony, which were in support of the plea of privilege filed by the plaintiff in response to the defendant's cross-action, the assignments of error thereon in the direct bill of exceptions, not affirmatively showing that such action of the trial judge was harmful and prejudicial and necessarily affected the verdict, are insufficient to show reversible error.

6. Before the failure of the court to give in charge a requested principle of law will authorize the grant of a new trial, it must appear that the requested instruction was applicable to the facts and pertinent to the issues and was not covered by the general instructions given by the court to the jury; and where neither the general charge of the court nor any brief of the evidence adduced upon the trial is before this court, and it does not affirmatively appear from the direct bill of exceptions sued out by the losing party below that the principle embodied in the requested instruction was not substantially covered in the general instructions, it is not shown that the refusal and failure of the trial court to so charge the jury was erroneous.

7. The trial judge erred in failing to write out his charge in this case and read it to the jury, a written request that he do so being made by counsel for the plaintiff in error during the trial (which consumed several days) and at least two days before the judge began his charge to the jury. Such failure rendered the charge as given to the jury a nullity.

Decided February 18, 1935. Rehearing Denied March 1, 1935. Action of libel; from city court of Atlanta—Judge Dorsey. December 21, 1933. (Application to Supreme Court for certiorari.)

George G. Finch, for plaintiff.

William G. Grant, Marion Smith, James A. Branch, James W. Austin, E. A. Stephens, J. Walter LeCraw, William Schley Howard, R. Emerson Gardner, for defendant.

SUTTON, J. William G. McRae brought suit against John A. Boykin for alleged libel. The defendant answered and filed a counter-claim, based on alleged libelous statements of the plaintiff concerning him, which he alleged had damaged him. The case proceeded to trial before a jury and the trial resulted in a verdict for the defendant for $1,000. Plaintiff made no motion for new trial, but sued out a writ of error direct to this court, assigning error upon certain rulings, orders, and charges of the court, as being necessarily controlling upon the final verdict and judgment in the case. No brief of the evidence adduced upon the trial of the case was incorporated in the bill of exceptions, or attached thereto and properly identified, or sent up with the record and duly approved.

1. The defendant moves to dismiss the writ of error, on the ground that the assignments of error are as to matters which do not necessarily control the verdict and judgment; and that the recitals in the bill of exceptions that the rulings complained of were controlling and affected the verdict were conclusions of the plaintiff in error, and that the bill of exceptions should point out how and in what manner such rulings entered into, affected, and necessarily controlled the final verdict and judgment. Exceptions were taken to and error assigned on the rulings complained of. Exceptions were also taken to and error assigned on allowing the verdict to be taken and judgment

entered, because the alleged erroneous rulings entered into and affected the final judgment. Under the ruling in *Lyndon v. Georgia Railway & Electric Co.*, 129 *Ga.* 353, 360 (58 *S. E.* 1047), this was sufficient. "In any cases where the judgment, decree, or verdict has necessarily been controlled by one or more rulings, orders, decisions, or charges of the court, and the losing party desires to except to such judgment, decree, or verdict, and to assign error on the ruling, order, decision or charge of the court, it shall not be necessary to make a motion for new trial, nor file a brief of the evidence, but the party complaining shall be permitted to present a bill of exceptions containing only so much of the evidence or statement of facts as may be necessary to enable the Supreme Court to clearly understand the ruling, order, decision, or charge complained of." (Civil Code (1910), P. 6144. The method of bringing cases to this court by direct bill of exceptions, as pointed out in this section of the code, without filing a brief of the evidence, "does not authorize the segregation and bringing to this court, by direct bill of exceptions, of every alleged error committed in the course of a trial. It only authorizes this to be done by direct and brief form of bill of exceptions in cases where the judgment, decree, or verdict has necessarily been controlled by such rulings, orders, decisions, or charges; and this must be made to appear." *Henderson v. State*, 123 *Ga.* 739 (2) (51 *S. E.* 764). The act of 1898 (Ga. L. 1898, p. 92) "renders unnecessary the filing of a motion for a new trial, when the case depends upon a controlling question of law and the complaint is that the trial judge committed a vital error with respect to the same. The losing party in any case might very properly concede that, under the evidence and a given charge, the verdict against him, assuming the charge to be correct, was demanded; yet, at the same time, he might with abundant reasons insist that because of error in the charge, the jury were constrained

to find as they did. The correction by this court of such an error results in a new trial." *Taylor v. Reese*, 108 *Ga.* 379, 381 (33 *S. E.* 917); *Taylor v. State*, 108 *Ga.* 384 (34 *S. E.* 2). This act was but an adoption in more explicit terms of the common law already in force in this State. *Taylor v. Reese*, supra. Prior to that act the Supreme Court had held that it would not grant a new trial in cases where no motion therefor had been made in the lower court except that the errors complained of "were serious and likely to change the verdict." *Roberts v. Neal*, 62 *Ga.* 163. In *Trippe v. Wynne*, 76 *Ga.* 200, it was intimated that the court would, in such an instance, only pass upon the error where the same was "material." In *Collier Co. v. Murphey*, 108 *Ga.* 777 (33 *S. E.* 641), decided after the above act of 1898 was adopted, it was held that an erroneous ruling of the trial court as to who was entitled to the opening and closing argument before the jury would not be reversed on a direct bill of exceptions, unless the same was shown to be injurious to the excepting party. In *Ocean Steamship Co. v. Hamilton*, 112 *Ga.* 901 (3) (38 *S. E.* 204), it was held that the error complained of in a direct bill of exceptions should be one which "singly or in connection with another or others" necessarily controlled the verdict, and that if it was not, the direct exception was without avail. See also *Ray v. Morgan*, 112 *Ga.* 923 (38 *S. E.* 335); *Darien Bank v. Clarke Lumber Co.*, 112 *Ga.* 947, 951 (38 *S. E.* 363); *Cable Co. v. Parantha*, 118 *Ga.* 913 (45 *S. E.* 787).

Counsel for the defendant contends that this court has no jurisdiction to pass upon any question made in the bill of exceptions, for the reason that the verdict was not necessarily controlled by any of the rulings, decisions, or charges complained of, within the meaning of said act of December 20, 1898, embodied in the Code of 1910, P. 6144. In order to determine the true interpretation to be placed upon this act it

is necessary to consider the practice as it existed prior to its passage. An able and elaborate discussion of this question will be found in *Cawthon v. State*, 119 *Ga.* 395, 402 (46 *S. E.* 897), et seq, in which it was in substance and effect held: Cases may be carried to the Supreme Court "on a bill of exceptions specifying the error or errors complained of in any decision or judgment." See 1 *Ga. viii, ix.* In the first criminal case brought to the Supreme Court no motion for a new trial was made, but the case was brought to that court upon a bill of exceptions assigning error upon a ruling refusing to continue the case, upon rulings made while the jury was being impanelled, and upon rulings made on the admission and rejection of evidence. The court entertained jurisdiction of the writ of error, and reversed the judgment. *Sealy v. State*, 1 *Ga.* 213 (44 *Am. D.* 641). In the next criminal case brought to the Supreme Court, the bill of exceptions assigned error upon various rulings made during the trial, upon the overruling of a motion to arrest the judgment, and upon the overruling of a motion for a new trial. The court entertained jurisdiction of this writ of error, and granted a new trial to the defendant. Both of these cases were brought to the Supreme Court under the law as set out above as contained in the 1 *Ga. viii, ix.* "While no question was made in either case or directly passed upon by the court as to what was the proper practice to be pursued, or what was the proper construction of the act organizing the court, the practice followed by lawyers of the standing of those who represented the plaintiffs in error," Hines Hold and Henry L. Benning, "and acquiesced in by such lawyers as Levi B. Smith, E. H. Worrill, and Absalom H. Chappell, who represented the State in the respective cases, is entitled to very grave consideration when it is to be determined what was the opinion of the profession at that time as to the practice to be pursued in bringing cases to" the Supreme Court. "An examination of the records of" the Supreme Court "in the earlier volumes will show that the prac-

tice above indicated was followed generally by the profession throughout the State, that is, the losing party determined by himself whether he would bring an error of law to" the Supreme Court "by direct bill of exceptions or embody it in a motion for new trial if the ruling was of such a character as could be properly made the ground of such a motion."

It is now contended that, since the passage of the act of 1898, this court has no jurisdiction to entertain a direct bill of exceptions in any case where a verdict has been rendered and a motion for a new trial would be an appropriate remedy, until such a motion has been made and passed upon by the trial judge, except in those cases where it appears distinctly from the bill of exceptions and the record that the ruling complained of was of such a character as to constrain the jury to find the verdict rendered, that is, the ruling must be of such a character that no jury could have legally rendered any other verdict than the one complained of. It is claimed that the effect of the act of 1898 is to abolish altogether the right of this court to review by direct writ of error any other rulings than those of the character above indicated, and that the effect of the act was to work a radical change in the practice which was more or less followed from the time the Supreme Court was established down to the passage of the act of 1898, and even since that date. Our appellate courts have on many occasions commended the practice of making a motion for new trial before filing a bill of exceptions, thus giving to the trial judge an opportunity to review his rulings which are complained of. Neither the Supreme Court nor the Court of Appeals has ever held, so far as we are advised, that it was absolutely necessary to make a motion for new trial in order to give them jurisdiction to review an error of law in a ruling made in the trial of a case. If the act of 1898 be construed as contended for by counsel for the defendant, it would be applicable to very few cases; and

if it be given the construction which we give it, it preserves to litigants a right which has existed ever since the establishment of the Supreme Court. We do not think it was the purpose of the legislature to abolish this long-established practice, nor do we think the language of the act, properly construed, has this effect. In the case of *Taylor v. Reese*, supra, the opinion indicates that it was the opinion of the Supreme Court at that time that the act of 1898 was only declaratory of the existing law, being a recognition of the practice which had long been followed with the approval of the bar and without the disapproval of the bench. It is impossible for anyone to carefully examine the assignments of error dealt with in *Taylor v. State*, supra, which was the case in which the bills of exception referred to in *Taylor v. Reese* were passed upon, and reach the conclusion that the act of 1898 was then construed as is now contended for by counsel for the defendant. None of the rulings which were considered and passed upon in that case were of such a character as to constrain the jury to find the verdict rendered. The alleged errors were, as held in *Taylor v. Reese*, supra, simply of such a character as deprived the accused of a substantial right, and, using the language of the learned Justice who wrote the opinion, "the verdicts actually rendered were necessarily so far controlled by the judge's action as to necessitate a new trial." A careful consideration of the opinion in *Taylor v. Reese* as well as that in *Taylor v. State* cannot lead to any other conclusion than that it was the opinion of the Supreme Court, for which the author of those opinions was speaking, that under the act of 1898 the losing party could by a direct bill of exceptions complain of any error committed during the progress of the trial which deprived him of a substantial right and required a reversal of the judgment of the trial court. These opinions were concurred in by six Justices. It is now claimed that in subsequent opinions a different rule is laid down. Any ruling or language in conflict with the ruling in *Taylor v. Reese*